

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

HY-KO PRODUCTS COMPANY,)	
)	
and)	
)	
AURORA PROPERTIES HOLDING)	CIVIL ACTION NO.
COMPANY, LLC,)	5:08-CV-1961 (Dowd)
)	Judge Dowd
Plaintiffs,)	
)	
v.)	
)	
THE HILLMAN GROUP, INC.,)	
)	
Defendant.)	

**HILLMAN'S MOTION FOR LEAVE TO FILE SECOND
AMENDED ANSWER INCLUDING ADDITIONAL
COUNTERCLAIMS OF INFRINGEMENT AGAINST PLAINTIFFS INSTANTER**

By the Court's Order of April 1, 2009, the deadline to amend pleadings and/or to add parties is set for May 1, 2009. Consistent with this Court's Order, Defendant The Hillman Group, Inc. ("Hillman") hereby moves to file its "Second Amended Answer"¹ Including Additional Counterclaims of Infringement Against Plaintiffs." The additional counterclaims allege infringement by Plaintiffs of United States Patent No. 6,064,747 ("the '747 patent"). The original counterclaims allege infringement by Plaintiffs of United States Patent No. 7,114,894 ("the '894 patent").

In addition to the fact that the Second Amended Answer is timely and consistent with the Court's Order, Hillman submits that its motion should be granted because resolving the

¹ Hillman's Second Amended Answer is attached hereto. Hillman's First Amended Answer was filed in response to Plaintiff's First Amended Complaint and was not precipitated by Hillman.

counterclaims of infringement of the '747 patent is in the interest of judicial efficiency. Namely, the counterclaims relating to infringement of the '747 patent involve the same parties and the same accused products as the original counterclaims for infringement of the '894 patent. Further, since Plaintiffs have yet completed their discovery obligations, adding the '747 patent at this stage will not prejudice Plaintiffs. Moreover, Hillman believes that the addition of the '747 patent will not cause the parties to repeat any discovery that has been taken thus far.

Pursuant to Fed. R. Civ. P. 15(a), "leave shall be freely given when justice so requires." The Sixth Circuit employs the following factors in determining whether to grant leave: "undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendment, undue prejudice to the opposing party, and futility of the amendment." *Seals. v. General Motors Corp.*, 546 F.3d 766, 770 (6th Cir. 2008) (citing *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 459 (6th Cir. 2001)).

The above-listed factors are either neutral or weigh in favor of the Court granting Hillman's motion for leave to file the Second Amended Complaint. For example, this amendment is being filed prior to the deadline to amend pleadings, and thus, there is no undue delay in the filing of the Second Amended Answer. In addition, Hillman believes that Plaintiffs have been aware of the '747 patent, and therefore, there is sufficient notice to Plaintiffs. Further, because discovery is still ongoing and infringement of the '747 patent involves the same accused devices, Plaintiffs will not suffer undue prejudice and the parties and this Court may recognize efficiencies by resolving infringement of the '747 patent in this action.

For at least the foregoing reasons, Hillman respectfully requests that the Court grant Hillman leave to file the attached Second Amended Answer to include counterclaims against Plaintiffs for infringement of the '747 patent. Hillman believes that the Court may wish to

modify certain aspects of the current procedural schedule in this action as a result of the Second Amended Answer. Hillman will consult with Plaintiffs on these scheduling matters with the objective of filing a joint motion concerning any proposed scheduling changes.

Dated: April 30, 2009

Respectfully submitted,

/s/ Daniel F. Gourash

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing HILLMAN'S MOTION TO FILE SECOND AMENDED ANSWER INCLUDING ADDITIONAL COUNTERCLAIMS OF INFRINGEMENT AGAINST PLAINTIFFS *INSTANTER* was filed electronically on this 30th day of April, 2009. Parties will receive notice through the Court's electronic filing system.

/s/ Daniel F. Gourash

One of the Attorneys for Defendant
The Hillman Group, Inc.